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MICHAEL T. BLATT.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

MICHAEL T. BLATT,

Defendant.

Case No. C 06 2022 SC

**DEFENDANT MICHAEL T.
BLATT'S MEMORANDUM
OF POINTS AND
AUTHORITIES IN SUPPORT
OF MOTION FOR RELIEF
FROM ADMISSIONS**

Date: October 26, 2007
Time: 10:00 a.m.
Courtroom: 1, Hon. Samuel
Conti, Sr.

Trial Date: November 19, 2007

Defendant MICHAEL T. BLATT ("Blatt") submits the following memorandum of points and authorities in support of his motion for relief from admissions.

STATEMENT OF FACTS

This is an insurance coverage action that arises out of Liberty Mutual's defense of defendant Michael Blatt in an underlying construction defect action. The matter has been fully briefed in Liberty Mutual's Motion For Summary Judgment. This Motion For Relief From Admissions should be

1 decided by the Court as part of Defendant's Opposition to the Motion For
2 Summary Judgment.

3 In its Reply Brief in support of its Motion For Summary Judgment,
4 Liberty Mutual attached Requests for Admissions as evidence in support of its
5 motion. Liberty Mutual did not rely upon these purported admissions at the
6 time of filing its Motion for Summary Judgment, as its supporting evidence.
7 As described in the supporting declaration of attorney Ronald D. Foreman,
8 Blatt served verified responses to the Request For Admissions and a Special
9 Interrogatory on October 4, 2007. As such, Blatt has complied with the
10 discovery requests. However, Blatt seeks relief from the claimed admissions as
11 plaintiff is taking the position that the Request For Admissions have been
12 deemed admitted. Blatt seeks relief based upon Fed. R. Civ. Pro. 36 (b) and
13 Fed. R. Civ. Pro. 60.

14 Liberty Mutual served Request for Admissions, Set One and Special
15 Interrogatory, Set One on July 18, 2007. As explained in the declaration of
16 attorney Ronald D. Foreman, Liberty Mutual agreed to extend the time for
17 responses and then unilaterally declared, without warning, that the admissions
18 were deemed admitted on October 4, 2007. Counsel for Blatt relied upon the
19 agreed to discovery extensions and once notified of the declared default in
20 responding to the Request For Admissions (and Special Interrogatory), served
21 verified responses within *5 hours* of the declare of default. (See **Exhibit 1** and
22 **Exhibit 2** to the supporting Declaration of attorney Ronald D. Foreman)

23 Although Fed R. Civ. Pro. 36 (b) states that admissions are deemed
24 admitted if not timely responded to, it is clear from the exchange of emails
25 attached to the declaration of Ronald D. Foreman that the parties mistakenly
26 treated plaintiff's Request For Admissions as though they were served in
27 accord with Calif. Code of Civil Procedure 2033.010 in which parties can
28 stipulate to extend the time for making discovery responses, with impunity.

1 That mutual mistake is now being used as a sword by Liberty Mutual against
 2 Michael Blatt. Consequently, the requested Relief From Admissions is soundly
 3 based upon the authorities set forth hereinafter and Fed. R. Civ. Pro. 60, which
 4 provides for relief based upon a mistake, inadvertence and excusable neglect.

5 LEGAL ARGUMENT

6 An admission may be amended or withdrawn by leave of court on
 7 noticed motion. This applies both to express admissions and those resulting
 8 from a failure to respond. Fed. R. Civ. Proc. 36(b); *999 C.I.T. Corp.* (9th Cir.
 9 1985) 776 F.2d 866, 869.

10 The Court will allow relief if the withdrawal will aid in presentation of
 11 the merits of the case; no substantial prejudice to the requesting party will
 12 result from allowing the admission to be withdrawn and the Request For Relief
 13 is timely made¹. Fed. R. Civ. Proc. 36(b).

14 Although it is anticipated that plaintiff may claim a form of prejudice by
 15 the delayed service of the responses to Request For Admissions and Special
 16 Interrogatory, that is truly not the case, as the verified responses were served
 17 on October 4, 2007, *5 hours* after defendant received notice that plaintiff was
 18 endeavoring to declare a default. (See the Declaration of Ronald D. Foreman
 19 in support of this Motion, Paragraphs 2-6.)

20 The defendant cannot assert “substantial prejudice” simply because an
 21 admitted fact will have to be proven at trial. A party must show some increased
 22 difficulty in proving the previously admitted fact, such as the unavailability of
 23 a witness. *Sonoda v. Cabrera* (9th Cir. 2001) 255 F.3d 1035, 1039; *Farr Man*
 24 *& Co. v. M/V Rozita* (1st Cir. 1990) 903 F.2d 871, 876; *Perez v. Miami-Dade*
 25 *County* (11th Cir. 2002) 297 F.3d 1255, 1264—[error to deny leave where no
 26

27 ¹This Motion For Relief From Admissions was made 15 days after defendant received notice that it was
 28 declaring the Request For Admissions deemed admitted and on the last day for hearing of regularly scheduled motions
 as entered by the Court on August 30, 2007.

1 substantial prejudice shown, even if motion untimely]; *Raiser v. Utah County*
2 (10th Cir. 2005) 409 F.3d 1243, 1246–[“preparing a summary judgment motion
3 in reliance upon erroneous admission does not constitute prejudice”].

4 Most courts hold that the prejudice must relate to the difficulty the
5 opposing party may face in proving its case at trial. Therefore, reliance on a
6 deemed admission in preparing a summary motion does not, by itself,
7 constitute sufficient prejudice to justify denial of a motion to withdraw the
8 admission. *Conlon v. United States* (9th Cir. 2006) 474 F.3d 616.

9 As set forth in the Declaration of Ronald D. Foreman in support of this
10 Motion, Paragraphs 8-13, it is demonstrated why plaintiff cannot meet the
11 legally mandated prejudice contemplated by Fed. R. Civ. Pro 36 (b). On the
12 other hand, defendant Michael Blatt definitively demonstrates the prejudice he
13 will suffer if the automatic admissions are not deemed withdrawn and the
14 October 4, 2007 responses deemed operative. The recent decisions in
15 *Salisbury v. Detective Michael Ward* (2007) U.S. Dist. LEXIS 51375 and
16 *Allen v. The Ghoulish Gallery* (2007) U.S. Dist. Lexis 54197 support
17 defendant Michael Blatt’s Request For Relief.

18 The Court has broad discretion in granting relief. The Motion For Relief
19 should be granted because upholding the automatic admissions would
20 practically eliminate any presentation of the merits of the case or the
21 affirmative defenses. And as established in the supporting Declaration of
22 Ronald D. Foreman, it is apparent that the parties were operating under a
23 stipulation extending the time within which to respond to discovery, which
24 was unilaterally terminated by plaintiff’s counsel without warning. Once
25 plaintiff’s counsel terminated the extension, defendant promptly served
26 verified responses on October 4, 2007.

27 CONCLUSION

28 Based on the foregoing, it is respectfully requested that defendant’s

1 motion for Relief From Admissions be granted, that defendant's automatic
2 admissions be deemed withdrawn and the responses to Request to Admit Nos.
3 1-14 served on October 4, 2007, be deemed operative

4
5 DATED: October 19, 2007

FOREMAN & BRASSO

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7 By: /s/
8 Ronald D. Foreman
9 Attorneys for Defendant
10 Michael T. Blatt
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